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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

HUDSON TRANSIT LINES, INC.,

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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HUDSON TRANSIT LINES, INC.,

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Petitioner, Hudson Transit Lines, Inc., petitions for a writ of certiorari to review the judgment and decision of the United States Court of Appeals for the Third Circuit, entered in this case on August 21, 1970, enforcing a decision and order of the National Labor Relations Board.

Opinions Below

The decision and order of the National Labor Relations Board (App. p. 34a)* are reported at 173 NLRB

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*The abbreviation "App." refers to the appendix to this petition.

No. 13. The opinion of the United States Court of Appeals for the Third Circuit (App. p. 1a) enforcing the decision and order of the National Labor Relations Board is reported at 429 F. 2d 1223.

Jurisdiction

Jurisdiction to review by writ of certiorari the judgment and decision of the United States Court of Appeals for the Third Circuit, entered August 21, 1970 (App. p. 20a) is invoked under 28 U.S.C. Section 1254 (1).

Question Presented

Whether an employer violates Section 8(a)(1) of the National Labor Relations Act, 29 U.S.C. Section 158 (a)(1), by instituting certain economies applicable to all officers and all employees, union and non-union, during the pendency of a representation proceeding and only after all balloting was completed in the representation election, when in the good faith judgment of the employer such economies are necessary to sustain and preserve fiscal integrity.

Statutes Involved

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. Section 151, *et seq.*) which are involved in this case are set forth in the Appendix (App. p. 56a). For the convenience of the Court, however, the pertinent provisions of Sections 7 and 8(a)(1) of the National Labor Relations Act are set forth immediately below.

> "Employees shal have the right to self-organination, to form, join, or assist labor organinations, to bargain collectively through representatives of

their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection . . .

It shall be an unfair labor practice for an employer to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 157 of this title;"

Statement of the Case

This petition seeks review of a judgment and decision of the Court of Appeals for the Third Circuit enforcing a decision and order of the National Labor Relations Board that Petitioner violated Section 8(a)(1) of the National Labor Relations Act (hereinafter referred to as "the Act"), by imposing certain economies applicable to all union and non-union employees and officers of Petitioner, after the holding of a representation election but prior to the certification of a bargaining representative. Petitioner contends that the institution of the economies was made in good faith and was justified by legitimate and substantial considerations incident to its preservation, solvency, and continued operation.

Petitioner (hereinafter referred to as either "Petitioner" or "Company") is a common carrier primarily serving summer resort areas (JA 20-21).* Its business is seasonal and it operates at a profit only during June, July and August and at a loss the remaining months of the year (JA 21). However, because of Interstate Commerce Commission requirements, the Company is required to operate twelve months of the year and to render reasonably con-

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*The abbreviation "JA" refers to the joint appendix which was filed with the Court of Appeals and which is a part of the certified record in this case.

tinuous and adequate service to the travelling public and to keep itself in a sound economic position so as to be able to afford this required service (JA 18-19, 21).

Since 1950 the Company's bus operators have been represented by Transport Workers of America, Local 225 (hereinafter referred to as "Local 225"). Since 1955 there have been six successive labor contracts between the Company and Local 225 (JA 22). Each of the contracts expired in mid-January (JA 13). The last labor contract prior to the events upon which the unfair labor practice in this case is based expired on January 15, 1967 (JA 22).

By letter dated October 27, 1966, the Independent Bus Transit Union (herinafter referred to as "Independent") advised the Company that it claimed to represent employees in the bargaining unit covered by the Local 225 contract (JA 127). On October 28, 1966, the Independent filed a representation petition with the National Labor Relations Board (JA 131).

On November 10, 1966, an informal conference among all parties was held at the Regional Office of the Board. The Company offered to consent to an election and specifically advised all present that it had serious economic problems in that it relied on summer revenues to offset losses during the other quarters of the year and wanted the representation matter resolved as quickly as possible. The two unions were unable to agree, however, and the matter was set for formal hearing on November 15, 1966 (JA 24-25). At that time and again on December 9, 1966, and January 9, 1967, the Company again urged that the representation matter be resolved as quickly as possible (JA 26). The election was conducted on January 9, 1967. Nine votes were challenged which were sufficient in number to effect the results of the election.

Consequently, certification of a bargaining agent was delayed (JA 95).

On January 13, 1967, just two days prior to the expiration of the contract with Local 225, the Company addressed itself by letter to its employees. It recited "the uncertainties of the present situation" and the resultant need for "economies". To avoid possible hardships on the employees the Company said it would postpone such economies to February 5, 1967, in the hope that the "uncertainties" would be resolved (JA 106).

Two days later, on January 15, 1967, the Independent filed and served objections to the conduct of the election (JA 5).

On February 2, 1967, the Company issued a second letter wherein it again referred to the "uncertain conditions relating to certification", "the question of who will be certified and wtih what union the Company can negotiate", and the consequent lack of assurance that the Company would be in operation during the critical summer months. The letter further specified that pending a report of its accountant it would make certain economies which would be applicable to salaries and wages of officers and employees in all categories, effective February 5, 1967. The economies consisted generally of a 10 per cent wage reduction for all employees whose gross weekly wages exceeded $100.00 and the elimination of certain fringe benefits (JA 98-99). The Company's accountant later recommended a 20 per cent to 25 per cent reduction but the Company decided to bear this additional burden on its own (JA 38-39).

The objections to the election were dismissed on February 17, 1967. An appeal was then taken to the Board which sustained the dismissal (JA 5). It was found that

the Company did nothing to interfere with the election (JA 135).

Challenged ballots were directed to be counted by the Board on March 28, 1967 (JA 96). The revised tally showed that of 208 valid votes counted, 100 were cast for the Independent, 106 for Local 225, and 2 against both unions (JA 96). Local 225 was certified as Collective Bargaining Representative on March 31, 1967 (JA 97).

Negotintions between Local 225 and the Company for a new contract commenced April 7, 1967. The parties bargained regarding restoration of the economies. Local 225 initially demanded restoration in full and the Company refused because it "still did not know whether we were going to operate during the summer months" (JA 9-10, 33). The Company later offered to restore the economies provided all terms and conditions of a renewal contract were agreed upon by May 1st and that the renewal contract would itself expire in January (JA 10, 35). The May 1st date was important to the Company because its "work force has to be increased because during the summer months is their peak business season, they increase their work force by about one-third and I guess their business picks up maybe 50 per cent." (JA 16). The Union countered that their members would prefer forfeiting restoration of the economies in favor of a contract commencing and expiring on the date negotiations were completed (JA 34). Subsequently, on April 22, 1967, the parties executed a renewal contract covering the period March 31, 1967, to March 31, 1969 (JA 103-105). Although all of the economies were not restored, the Union obtained more than it had ever received in any prior negotiations (JA 40).

Both unions filed unfair labor practice charges with the National Labor Relations Board which ultimately de-

termined that Petitioner was in violation of Section 8 (a)(1) of the Act. As previously indicated, the Board's order was enforced by the Court of Appeals for the Third Circuit.

Reasons for Granting the Writ

The decision of the Court of Appeals raises important questions of federal labor laws which should be reviewed by this Court. More specifically, the scope and meaning of the Court's decision in *Universal Camera Corp.* v. *N.L.R.B.*, 340 U.S. 474 (1951) together with *N.L.R.B.* v. *Great Dane Trailers, Inc.*, 388 U.S. 26 (1967); *N.L.R.B.* v. *Fleetwood Trailer Co.*, 389 U.S. 375 (1967), *American Ship Building Company* v. *N.L.R.B.*, 380 U.S. 300 (1965) and decisions akin thereto, are brought into serious question.

Universal Camera teaches us that decisions made by the National Labor Relations Board must be supported by substantial evidence when viewed in the light of the *entire* record in *that* case *then* pending before the Court. Fragmentary evidence, mere suspicion or conjecture is not enough. We believe the Court of Appeals has strayed from these teachings. The Court appears to accept the thesis that employer conduct which in *a given* case could adversely affect employee rights, will have a similar affect in *all* cases involving the same or similar conduct; *i.e.*, in this case— wage reductions during a representation proceeding. Such conduct, we are told, serves as an indication to employees that by engaging in a representation proceeding they will be vulnerable to a reduction in salary, etc. This may be true in a majority of instances but cannot be applied blindly. We believe that it is the Court's responsibility to make that determination on the facts of *each* case. The Court of Appeals did not do so.

The record is replete with evidence that the Company's conduct was designed to serve legitimate business ends. There can be no dispute that revenues derived during summer months were critical to the Company. This was the only period to time that the Company could operate at a profit and offset losses sustained during the remaining months of the year. When, on February 2, 1967, the Company addressed itself to its officers and employees and announced the economies to be effective February 5, 1967, it did so in the belief that it had serious economic problems arising out of the fear of a possible strike during the summer months. The consequent lack of assurance that it would be able to operate during these months required that the Company "commence some solution to the problem" and endeavor to "reduce its operating expenses to the point where they can be met by current revenues".

The record is also replete with evidence of the Company's efforts to resolve its financial dilemma both prior to and following the representation election. Evidence of the Company's willingness to restore the cuts if assured of a summer operation was rejected by the Board and ignored by the Court of Appeals. In fact, no action was taken until after the election. The record is barren of evidence that the Company was either a serious contender in the election or showed any favoritism between the two unions. Under these circumstances the keystone determination that the Company's conduct had the potential for adverse effect on employee rights is pure surmise; a guess.

The action below is so unfair, unjust and discriminatory as to appall a fair-minded man. If an employer, like the instant one, can be subject to such action, without being protected by this Court, then such employer,

has neither constitutional rights nor civil rights, nor even the right to act fairly and without discrimination, in an act of self-preservation.

The Court of Appeals decision directly conflicts with prior decisions of this Court. *American Ship, Great Dane, Fleetwood et als.*, hold that when employer conduct is inherently destructive of employee interests the Board may infer an improper motive notwithstanding evidence of business justification, and thereby achieve the proper balance between the justification and the invasion of employee rights. In this case, the Court of Appeals made no determination that Petitioner's conduct was of the inherently destructive category. There was therefore no right to weigh any evidence of business justification against the adverse impact on employee rights. Given evidence of a comparatively slight affect on employee rights and business justification, the Court should have then turned its attention to whether the Board had made an affirmative showing of improper motivation. It did not do so. Rather, the Court of Appeals did weigh adverse impact against business justification and concluded that the Board's decision in that regard was correct. In doing so, it departed from applicable decisions of this Court.

CONCLUSION

For the foregoing reasons Petitioner respectfully requests that its petition for a writ of certiorari be granted.

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[APPENDIX FOLLOWS]

APPENDIX A

Opinion of the United States Court of Appeals
(Filed July 20, 1970)

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 17,999

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

v.

HUDSON TRANSIT LINES, INC.,

Respondent.

ON APPLICATION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

Argued April 9, 1970

Before SEITZ, ADDISON, *Circuit Judges*, and LATCHUM, *District Judge*

LATCHUM, *District Judge*.

The National Labor Relations Board, pursuant to §10(e) of the National Labor Relations Act,[1] petitions for en-

[1] 29 U.S.C. §160(e).

forcement of its order[2] against Hudson Transit Lines, Inc. ("Hudson"). The Board found that Hudson had committed an unfair labor practice, in violation of §8(a)(1) of the Act,[3] by imposing without adequate business justification a reduction in the salary and fringe benefit payments of all company employees after the holding of a representation election by the company's bus operators and maintenance employees but before the certification of a bargaining representative.

Hudson is a common carrier primarily serving summer resort areas in New Jersey. Since 1950 the company's bus operators have been represented by the Transport Workers of America, Local 225 ("TWU").[4] Since 1955 there have been six successive labor contracts between the company and TWU. Each of the contracts expired in mid-January. The last labor contract in effect prior to the events forming the subject of this application expired on January 15, 1967.

By an exchange of letters dated October 24 and 26, 1966 TWU and Hudson each signified its with to open negotiations for a new contract. On October 27, 1966, the Independent Bus Transit Union ("IBTU") wrote the company, claiming to represent employees in the bargaining unit covered by the TWU contract and asked to negotiate. On October 28, 1966, IBTU filed a representation petition

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[2] 173 NLRB No. 13.

[3] 29 U.S.C. §158(a)(1).

[4] In 1961, Local 225 was also certified as the bargaining agent for the company's maintenance employees.

with the National Labor Relations Board pursuant to §9 of the Act.[5] After consultation and negotiation among representatives of Hudson, the Labor Board, and the two contesting unions, a representation election was held on January 9, 1967. Nine votes cast at the election were challenged. Because this challenge had the effect of delaying the certification of a bargaining representative, there was no certified bargaining agent for the employees of the company when the then existing collective bargaining agreement expired on January 15, 1967.

During the preliminary conferences in regard to the election, the company several times averted to the economic uncertainties which plagued the company, its very tight economic situation during the winter months and its desire that no delay occur in holding the election and determining the certified bargaining agent. For example, at the "informal conference" in the Board's regional office on November 10, 1966, John F. X. O'Brien, attorney for the respondent, offered to consent to an election, stating that the company "has serious economic problems" for it "counted on the summer revenues to offset [the] losses" incurred during the remainder of the year. Because of the seasonal nature of the company's business, it has operated at a profit only during June, July and August, and at a loss the remaining months of the year.[6] Under its

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[5] 29 U.S.C. §169.

[6] For example, losses in excess of $180,000 had been absorbed during the period January 1 to June 30 in 1966 and an operating loss of over $225,000 was experienced for the period January 1 to June 30, 1967. Losses in excess of $100,000 for the period January 1 to June 30 had been experienced in three of the four years from 1963 to 1966. Losses were also incurred during the fourth quarter of the year.

certificate of convenience from the Interstate Commerce Commission, Hudson was obligated to furnish reasonably adequate service to the public during the year, and also keep itself in sound economic condition to render this service.

At the formal hearing on November 15, 1967, Attorney O'Brien, during off-the-record discussions, repeated that the company was most anxious that the representation issue be brought to a head as soon as possible because the labor contract with TWU would expire January 15 and the company needed assurance for its summer operations. On January 9, after the election was held, and it was apparent that challenges to certain ballots and the anticipated filing of objections to the election by IBTU would delay final resolution of the election for at least a month, President Flateman of Hudson, as he later testified "was just besides [himself]." "I told [the parties] that unless somethings (sic) were done, unless the company had the assurance that we were going to be operating in the summer that we would have to make certain economic adjustments."

On January 13, 1967, two days prior to the expiration of the contract with TWU, Hudson circulated a letter to its employees referring to the "uncertainties of the present situation" and the resultant need for economies. The company said that it would postpone decision on the necessary economies until February 5, 1967 in the hope that the "uncertainties" would be resolved, "and a new contract mutually agreed upon." With IBTU's objections to the election still unresolved, the company announced in a letter of February 2, 1967 that because of continuing uncertainties the company planned to institute on Feb-

ruary 5, 1967 certain economies applicable to all officers and employees. The economies consisted generally of a 10% wage reduction for all employees whose gross weekly wages exceeded $100 and the elimination of company contributions to Blue Shield, Major Medical and life insurance premiums, and the elimination of all accruals for vacations and paid holidays. These economies were put into effect on February 5, 1967.

On March 31, 1967, IBTU's objections to the conduct of the election were overruled and the challenges to the ballots resolved. TWU, found to have won the election by a vote of 106 to 100, was formally certified as the bargaining agent for unit employees. Negotiations between TWU and the company for a new contract commenced on April 7, 1967. The union initially demanded restoration in full of the economies and the company refused. The company later offered to restore the economies provided (1) all terms and conditions of a renewal contract were agreed upon by May 1st and (2) the renewal contract would itself expire in January. The union refused, stating that the men had waited "too long" for a later starting date and that the union would prefer to make the contract effective as of the date negotiations would be completed. Subsequently, on April 22, 1967, the parties executed a renewal contract covering the period May 31, 1967 to March 31, 1969. The new contract restored the vacation and paid holidays in full; the other reductions—the 10% cut in pay and the elimination of contribution to medical and life insurance—were restored only as of March 31, the effective date of the new contract and not as of February 5, the date these cuts had been made effective. The increases guaranteed to the union in the new contract were the most favorable in any contract up to that time. In

accepting the new contract, however, TWU clearly indicated that it was not waiving its right to assert that the reductions were illegal from their inception.

Unfair labor practice charges were filed by IBTU on February 6, 1967 and by TWU on April 11, 1967. Both complaints charged that Hudson's imposition of the reduction in salary and benefits before the final resolution of the representation proceeding violated §8(a)(1) and §8(a)(3). After the filing of the complaint by the General Counsel, a hearing was held on September 21 and 22, 1967 before Trial Examiner Arthur Christopher. On December 9, 1967, Mr. Christopher died before completing his decision. The parties waived a hearing *de novo* and agreed that a decision should be made by a newly designated Trial Examiner on the basis of the record made before the original Trial Examiner. The new Trial Examiner, A. Norman Somers, designated according to this agreement, thereafter rendered a decision finding that Hudson had violated §8(a)(1) and §8(a)(3).[7] The Board,

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[7] The National Labor Relations Act, as amended, §(a), 61 Stat. 140, 29 U.S.C. §158(a) (1965 ed.) provides: "It shall be an unfair labor practice for an employer—

> "(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title;
>
> "(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization. . . ."

National Labor Relations Act, as amended, §7, 61 Stat. 140, 29 U.S.C. §157 (1965 ed.) provides: "Employees shall have the

(*Footnote continued on following page*)

in approving the Trial Examiner's decision and order, relied only on §8(a)(1) and did not deem it necessary to determine whether the conduct in question also violated §8(a)(3).

The basic standards for judicial review of an unfair labor practice finding by the Board under §8(a)(1) have been stated in *Labor Board* v. *Burnup & Sims*, 379 U.S. 21 (1964) and *Republic Aviation Corp.* v. *Labor Board*, 324 U.S. 793 (1945). In *Burnup & Sims*, the Court held that "the tendency" of the employer's conduct "to weaken or destroy" rights protected by §7 is the controlling standard for determining a violation of §8(a)(1). 379 U.S. 23-24. The Court further determined that finding an interference with §7 rights, in violation of §8(a)(1), "does not necessarily depend on the existence of an anti-union bias." 379 U.S. at 23.[8] In *Republic Aviation Corp.* v. *Labor Board*,

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(*Footnote continued from preceding page*)

right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment. . . ."

[8] The facts of *Burnup & Sims* illustrate the general principle that an anti-union motive is not necessary to the finding of an unfair labor practice under §(a)(1) (and that proper motive is not necessarily a sufficient defense to the charge of a violation under §8(a)(1)). In *Burnup & Sims*, the employer had discharged two employees who had sought to organize his plant, in the mistaken but good faith belief that the two employees in-

(*Footnote continued on following page*)

324 U.S. 793 (1945), the Court affirmed a finding by the Board that the nondiscriminatory discharge of an employee who had solicited union membership while on company premises, for violation of a company rule against solicitation in the factory or offices of the company, constituted a violation of §8(a)(1). The Court characterized this determination by the Board as the result of "working out an adjustment between the undisputed right of self-organization assured to employees under the Wagner Act and the equally undisputed right of employers to maintain discipline in their establishments." 324 U.S. 797-798. The Court further observed that the Wagner Act "did not undertake the impossible task of specifying in precise and unmistakeable language each incident which would constitue an unfair labor practice" but left to the Board the primary responsibility for applying the Act's general prohibitory language "in the light of the infinite combination of events which might be charged as violative of its terms." (324 U.S. 798).

Also relevant here are *Labor Board* v. *Grant Dane Trailers*, 388 U.S. 26 (1967) and *Labor Board* v. *Fleetwood Trailer Co.*, 389 U.S. 375 (1967), which identified two categories of unfair labor practices where proof of improper motive apparently is not necessary to establish a violation of §8(a)(3). These categories were summarized

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(Footnote continued from preceding page)

tended to use dynamite to blow up the plant if the union organizing effort did not succeed. The good faith of the employer, and the business propriety of a discharge for the reasons thought to exist by the employer, were not questioned by the Board before the Supreme Court, 379 U.S. 22, n. 2. In certain limited factual situations, such as the promise of benefits by an employer before a representation election, a showing of improper motivation has been required to establish a violation of §8(a)(1). *NLRB* v. *Gotham Industries*, 406 F.2d 1306 (1st Cir. 1969).

by Chief Justice Warren in his opinion for seven members of the Court in *Great Dane Trailers*. First, if an employer's conduct is "inherently destructive" of important employee rights, no proof of anti-union motivation is needed and the Board can find an unfair labor practice even if the employer introduces evidence that his conduct was motivated by business considerations. 388 U.S. 34. Second, if the employer's conduct could have adversely affected employee rights to some extent the employer must establish that he was motivated by legitimate objectives. 388 U.S. 34. If the employer does not establish the required "legitimate and substantial business justifications" for his action, the conduct constitutes an unfair labor practice "without reference to intent." 389 U.S. 380.

The articulation of these two categories of §8(a)(3) violations in *Great Dane Trailers* and *Fleetwood Trailer* seem to reflect and to particularize principles which the Court has recognized in evaluating violations under §8(a)(1), where proof of motive generally has not been necessary.[9] The clearest statement of the basic inquiry re-

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[9] Courts and commentators have noted that the Supreme Court's approach to §8(a)(1) and (3) "is presently in a state of flux" *Lane* v. *NLRB*, 418 F.2d 1208, 1209 (D.C. Cir. 1969). Christensen & Svanoe: Motive and Intent in the Commission of Unfair Labor Practices: The Supreme Court and the Fictive Formality: 77 Yale L.J. 1269 (1968). In *NLRB* v. *Brown*, 380 U.S. 278 (1965) and *American Ship Bldg.* v. *NLRB*, 380 U.S. 300 (1965) the Supreme Court accorded considerable weight to the factor of motive in establishing a violation under §8(a)(3). "We have determined that the 'real motive' of the employer in an illegal §8(a)(3) violation is decisive . . . 380 U.S. 287. *Great Dane Trailers* and *Fleetwood Trailer*, however, seem to indicate a more flexible, and integrated approach in evaluating alleged violations of §8(a)(3) and §8(a)(1). *Lane* v. *NLRB*, *supra*, at 1211. Christensen & Svanoe, supra, at 1330-31.

quired under both §8(a)(1) and §8(a)(3) is Justice White's opinion in *Labor Board* v. *Erie Resistor Corp.*, 373 U.S. 221. In attempting to corollate the inquiry into motive under §8(a)(3) with the weighing of "conflicting legitimate interests," without regard to motive, under §8(a)(1), Justice White stated that "preferring one motive to another is *in reality* the far more delicate task, reflected in part in decisions of this Court, of weighing the interests of employees in concerted activity against the interest of the employer in operating his business in a particular manner and of balancing in light of the Act and its policy the intended consequences upon employees rights against the business ends to be served by the employer's conduct." 373 U.S. 228, 229 (emphasis added). In so describing the basic reality of the inquiry in both §8(a)(1) and §8(a)(3) in *Erie Resistor*, Justice White relied on certain decisions of the Supreme Court which had recognized the necessity of the evaluation of conflicting legitimate interests without regard to motive.[10]

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[10] In this quoted portion of his opinion for the Court in *Erie Resistor*, Justice White referred in a footnote to four decisions of the Supreme Court: *NLRB* v. *Mackay Radio & Tel. Co.*, 304 U.S. 333 (1938); *Republic Aviation Corp.* v. *NLRB*, *supra*; *NLRB* v. *Babcock & Wilcox Co.*, 351 U.S. 105 (1956); *Labor Board* v. *Truck Drivers Union*, 353 U.S. 87 (1957); (*Buffalo Linen*). *Mackay Radio & Telegraph* recognized that a single employer's interest in continuing operations during a strike by hiring permanent replacement must be held to outweigh the employee's interest in making the strike effective. *Republic Aviation* clearly established, in the context of §8(a)(1) violation the primary responsibility of the Labor Board for the weighing of competing legitimate interests in light of the "infinite

(*Footnote continued on following page*)

Appendix A

It is this basic insight of Justice White in *Erie Resistor* concerning the actual nature of the inquiry under both §8(a)(1) and §8(a)(3) which is reflected in the articulation in *Great Dane Trailers* and *Fleetwood Trailer* of the two categories of §8(a)(3) violations which do not require proof of motive. Because *Erie Resistor*, *Great Dane Trailers* and *Fleetwood Trailer* reflect a substantial integration of approach in the evaluation of unfair labor practices

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(Footnote continued from preceding page)

combination of events" which might be charged as violative of the Act. In *Labor Board* v. *Babcock & Wilcox*, the Supreme Court, while recognizing that access of nonemployee organizers to company property is not governed by the same legal standard as the activity of employee organizers (thereby distinguishing *Republic Aviation*, *supra*) nevertheless recognized that the application of more restrictive legal standard of nonemployee union organizers still had to take account of the balance of employee and employer interests. As the Court stated: ". . . [I]f the location of a plant and the living quarters of the employees place the employees beyond the reach of reasonable union efforts to communicate with them, the employer must allow the union to approach his employees on his property." (351 U.S. 113). The Court found, however, that no such limiting conditions had been demonstrated in the case before it. In *Buffalo Linen*, the Court upheld the propriety of a lockout by a group of employers to preserve the integrity of a multi-employer bargaining unit. While recognizing that the Act protects "the right of employees to strike" the Court concluded that "this protection is not so absolute as to deny self-help by employers when *legitimate interests* of employees and employers collide. Conflict may arise, for example, between the right to strike and the interest of small employers in preserving multi-employer bargaining as a means of bargaining on an equal basis with a large union and avoiding the competitive disadvantages resulting from non-uniform contractual terms. The ultimate problem is the balancing of the *conflicting legitimate interests*. The function of striking that balance to effectuate national labor policy is often a difficult and delicate responsibility, which the Congress committed primarily to the National Labor Relations Board, subject to limited judicial review. (353 U.S. 96, emphasis added).

under §8(a)(1) and §8(a)(3), these §8(a)(3) decisions should be looked to as providing standards relevant to evaluating the finding of an unfair labor practice under §8(a)(1) in the present case.[11]

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[11] The Court in *Lane* v. *NLRB*, *supra*, concluded that in light of *Great Dane Trailers* and *Fleetwood Trailer*, the Supreme Court had established "two categories of Sections 8(a)(1) and 8(a)(3) violations which do not require proof of antiunion animus." 418 F.2d 1208, 1211. The analysis here is an essential agreement with the conclusion reached by the Court of Appeals in *Lane* v. *NLRB*, *supra*. In *NLRB* v. *Gotham Industries*, 406 F.2d 1306, *supra* n. 8, the Board found that the promise of an increase in wages before the holding of a representation election had interfered with the employees' right to self-organization under §8(a)(1). To establish that the promise of benefits constitutes a violation of §8(a)(1), improper (antiunion) motive must be established. In reviewing the determination of the Board, Judge Aldrich, finding *Great Dane* relevant, concluded that because the harmful effect of the promised pay increase was "comparatively slight" and because the employer had demonstrated "substantial and legitimate business justification" for promising the increase in wages, the burden remained on the Board to make out "an affirmative showing of improper motivation." 406 F.2d 1306, 1309 n. 5. This reading of *Great Dane* in *Gotham Industries* is consistent with the analysis of the Court here and that of Judge Wright in *Lane* v. *NLRB*, *supra*, as applied to the first two categories of unfair labor practices recognized in *Great Dane*. Judge Aldrich in *Gotham Industries* was concerned with the third category of violation envisaged in *Great Dane* where the adverse effect of the employer's conduct is at least comparatively slight and the employer has come forward with evidence of legitimate and substantial business justifications for his action. Judge Aldrich's implicity recognized that if the adverse impact of the employer's conduct is at least comparatively slight, proof of an antiunion motive is necessarily only if the employer has met his burden of establishing "legitimate and substantial business justifications" for his action. If the employer has not demonstrated "legitimate and substantial business justifications" the conduct constitutes an unfair labor practice "without reference to intent." *Fleetwood Trailer*, *supra*, at 380.

Appendix A

In light of the above standards, the first inquiry for the Court is to determine whether the Board's findings concerning the impact of the challenged employer conduct is supported by substantial evidence. At the outset, it must be noted that the Board's finding concerning the extent of the impact of that employer's conduct is not fully clear. At one point, the Trial Examiner adopted the position of the General Counsel that the "loss in earnings and benefits because of representation proceeding that was still pending 'could effectively inhibit any change by employees of their bargaining representative.'" The Trial Examiner further stated: "Unexplained, the conduct as of the time it occurred offended the employees' rights, protected by the Act, to engage in a representation proceeding . . ." There was no explicit finding by the Trial Examiner or the Board that the employer's conduct was "inherently destructive" of employee rights protected by the Act. On the other hand, the underlying premise of the Trial Examiner's decision was that the employer's reduction in salary and fringe benefits was at least "comparatively slight" within the standards of *Great Dane* and *Fleetwood*.

After review of the entire record, this Court is of the opinion that the impact of the reduction in salary and fringe benefits at least "had the potential for adverse effect upon employee rights." *Great Dane Trailers*, 388 U.S. 26, 35, and, therefore, required the employer to come forward with an adequate justification of his conduct.[12]

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[12] Section 7 provides, *inter alia*, that employees shall have "the right to self-organization, to form, join or assist labor organizations [and] to bargain collectively through representatives of their own choosing." Clearly "the right to self-organization" and the right "to bargain through representatives of their own choosing" encompasses the right of employees to choose their representatives openly and freely.

Appendix A

At the time the reduction salary and other employee benefits were imposed, the prior collective bargaining agreement had expired. The unresolved status of the election left the employees without a representative qualified to engage in collective bargaining on their behalf.[13] If such a unilateral reduction had been imposed, during the negotiations of a collective bargaining agreement but before impasse, the employer's conduct clearly would have been an unfair labor practice. *Labor Board* v. *Katz*, 369 U.S. 736 (1962). The potential for adverse impact in the employer's conduct here is not the rebuke to the process of collective bargaining involved in a unilateral change in salary during negotiations. Rather, it is the indication to employees that by engaging in a representation proceeding, and incurring the risk that an unresolved election may leave the employees temporarily without a representative, the employees will for that period be vulnerable to a reduction in salary and other benefits through the unilateral action of the employer. Because of the employee recognition of this vulnerability to serious reduction in economic benefits during the period when a representa-

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[13] The unresolved status of the election also left the employer without authority to recognize or to negotiate with either of the competing unions. An employer who recognizes or bargains collectively with one or two competing unions is guilty of an unfair labor practice without regard to his motivation. *Midwest Piping & Supply Co.*, 63 N.L.R.B. 1060 (1945). As subsequently revised and stated in *Shea Chem. Corp.*, 121 N.L.R.B. 1027 (1958), the *Midwest Piping* rule holds that "upon presentation of a rival or conflicting claim which raises a real question concerning representation, an employer may not go so far as to bargain collectively with the incumbent (or any other) union unless and until the question concerning representation has been settled by the Board." *Id.* at 1029.

tion election remains unresolved, the Board was justified in concluding that "employees would tend to think twice before again engaging in a representation proceeding.

Because we agree with the conclusion of the Board that the employer's imposition of economies before the resolution of the representation election "could have adversely affected employee rights to some extent" it is thus necessary to consider whether the employer has come forward with evidence of "legitimate and substantial business justifications" for his action. *Fleetwood Trailer, supra*, p. 380; *Great Dane Trailers, supra*, p. 34.

The basic justification offered by Hudson for instituting the challenged economies was that the unresolved status of the election in January and February of 1967, and the consequent uncertainty concerning when negotiations would begin and successfully be concluded, left the Company with "no assurance" of operations during the crucial summer months and, therefore, required the reduction of expenditures to the level of current revenues—in the company's words, required cutting "the suit to the cloth."

Hudson first claims that its decision to institute economies "was a matter peculiar to management prerogative" and as such, could not be questioned by the Board. In support of this extreme position, the Company relies on *Textile Workers Union* v. *Darlington Manufacturing Co.*, 380 U.S. 263 (1965). This reliance is seriously misplaced. In *Darlington*, the Supreme Court upheld the right of a company to go out of business in order to avoid the unionization of the employees of the plant. This recognition of a right of "industrial suicide" in *Darlington* has little relevance to the situation here, wheer an ongoing

concern imposed drastic reductions in the salaries and fringe benefits of all employees, before the resolution of a representation proceeding, when the employees were without a representative to protect their interests through collective bargaining. We, therefore, feel *Darlington* is inapposite and are not in any way persuaded to extend the scope of *Darlington* beyond the narrow and unusual factual situation there involved.

Further, the company has not contended, or offered any case which indicates, that the institution of economies "in face of union negotiating demands but before impasse" is a matter peculiar to management prerogative. If it is not a matter of exclusive management prerogative to institute economies while negotiations are in progress, there seems no reason for finding such a prerogative to institute economies "in the fact of a representation proceeding" when there is no representative with whom to conduct negotiations.

Hudson further contends that even if the institution of economies was not justified as a matter "peculiar to management prerogative," the need to make current operating expenses meet current revenues, because of the lack of assurance of summer operations, constituted "legitimate and substantial" business justification for the company's conduct. The Board found that the possibility of a strike in July or August was a remote and tenuous possibility which was "not commensurate with" and which, therefore, did not justify the drastic character of the company's action on February 5 and the overwhelming probability of its effect on employees' rights when the action was taken.

Appendix A

In reviewing this determination by the Board, it must be recognized that it is the primary responsibility of the Board and not of the courts "to strike the proper balance between the asserted business justification and the invasion of employee rights in light of the Act and its policy." 389 U.S. 278. In *Erie Resistor*, the Court recognized the special function of the Board in applying the general provisions of the Act to the complexities of industrial life and of "[appraising] carefully the interests of both sides of any labor-management controversy in the diverse circumstances of particular cases" from its special understanding of "the actualities of industrial relations. . . . 'The ultimate problem is the balancing of the conflicting *legitimate* interests. The function of striking that balance to effectuate national labor policy is often a difficult and delicate responsibility, which the Congress committed primarily to the National Labor Relations Board, subject to limited judicial review.'" 373 U.S. 236.

After a full consideration of the record—the weight of the evidence and convincing quality of the reasoning supporting the conclusions of the Board—we feel that the Board properly concluded that the adverse impact of the economies clearly outweighed the business justification for the economies offered by the employer. The Board's determination was faithful to the governing precedents, and supported by substantial evidence. *Universal Camera Corp.* v. *Labor Board*, 340 U.S. 474 (1951).

The Board, having found that the Company withdrew and reduced employee benefits in violation of the Act, directed the Company to make whole all employees for losses sustained to the extent it has not already done so. Before the Board, the Company complained that the rem-

edy is couched in general terminology, ambiguous and indefinite. But it is well settled that the Board is justified in framing its order in general terms and leaving the working out of the details to the subsequent compliance proceedings.[14] Such a rule is particularly salutary where, as here, the record does not disclose the extent to which, if at all, the Company may have restored to the non-unit employees the benefits which it eliminated or reduced on February 5.[15]

Hudson also objects to the scope of the order, contending that the Board improperly extended the make whole remedy to employees not within the bargaining unit. But it is clear that these employees, as well as those within the unit, were deprived of substantial economic benefits because the latter group had engaged in protected activity. Since the Company chose to extend its unlawful conduct to non-unity employees, it is hardly in a position to complain that these employees are to be made whole for the losses visited upon them as a result of such conduct. Cf. *Labor Board* v. *Zelrich Company*, 344 F.2d 1011, 1014 (5th Cir. 1965).

The Board's remedies for unfair labor practices will be upheld as valid if reasonably "adapted to the situation

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[14] *N.L.R.B.* v. *C.C.C. Associates, Inc.*, 306 F.2d 534, 539 (2d Cir. 1962); *Nathanson* v. *N.L.R.B.*, 344 U.S 25, 29 (1952); *N.L.R.B.* v. *Local 776, IATSE* (*Film Editors*), 303 F.2d 513, 521 (9th Cir. 1962), *cert. den.*, 371 U.S. 826.

[15] As to employees within the bargaining unit, the Company did not restore the 10 per cent pay cut and elimination of its contributions for health and life insurance for the period between February 5 and March 31, the effective date of the new contract.

which calls for redress."[18] The Board directed that all employees be made whole because "[o]nly thus can there be a restoration of the situation, as nearly as possible, to that which would have obtained but for the illegal [conduct]." *Phelps Dodge Corp.* v. *N.L.R.B.*, 313 U.S. 177, 194 (1941). It follows that the Board's order is reasonable and valid and will be ordered enforced.

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[18] *N.L.R.B.* v. *Mackay Radio & Tel. Co., supra.* Accord: *Fibreboard Corp.* v. *N.L.R.B.*, 379 U.S. 203, 216 (1964); *N.L.R.B.* v. *Strong*, 393 U.S. 357, 358-359 (1969); *N.L.R.B.* v. *Gissel Packing Co., Inc.*, 395 U.S. 575, 612 n. 32 (1969); *Leeds & Northrup Co.* v. *N.L.R.B.*, 391 F.2d 874, 879-880 (3rd Cir. 1968); *J. P. Stevens & Co., Inc.* v. *N.L.R.B.*, — F.2d —, 72 LRRM 2433, 2435-2436 (5th Cir. 1969).

A True Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit.

APPENDIX B

Judgment of the United States Court of Appeals

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 17,999

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

v.

HUDSON TRANSIT LINES, INC.,

Respondent.

Before:

SEITZ, ALDISERT, Circuit Judges, and LATCHUM, District Judge.

THIS CAUSE came on to be heard upon the application of the National Labor Relations Board for the enforcement of a certain order issued by it against the Respondent, Hudson Transit Lines, Inc., its officers, agents, successors, and assigns, on October 9, 1968. The Court heard argument of respective counsel on April 9, 1970, and has considered the briefs and transcript of record filed in this cause. On July 20, 1970, the Court being fully advised in the premises, handed down its decision granting enforcement of the Board's order.

Appendix B

On Consideration Whereof, it is hereby ordered and adjudged by the United States Court of Appeals for the Third Circuit that the said Order of the National Labor Relations Board in said proceeding be enforced and that Hudson Transit Lines, Inc., its officers, agents, successors, and assigns, abide by and perform the directions of the Board in said order contained.

It Is Further Ordered that costs shall be taxed against the Respondent.

By the Court

James L. Latchum
Circuit Judge

Dated: August 21, 1970

APPENDIX C

Trial Examiner's Decision

Statement of the Case

A. Norman Somers, Trial examiner: On July 18, 1967, the General Counsel issued a complaint alleging that Respondent engaged in unfair labor practices in violation of Section 8(a)(1) and (3) of the Act.[1] The case was heard before Trial Examiner Arthur Christopher, Jr. on September 21 and 22, 1967 in Newark, New Jersey, and briefs were thereafter filed with him by the General Counsel and the Respondent. On December 9, 1967, Trial Examiner Christopher died before completing his decision. The parties waived a hearing *de novo* and agreed that a decision be made and issued by a newly designated Trial Examiner on the basis of the record made before the original Trial Examiner. Thereupon the undersigned, A. Norman Somers, was duly designated as the Trial Examiner in the case.[2]

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[1] The complaint is based on charges filed on February 6, 1967 by Independent Bus Transit Union (hereafter IBTU), and on April 11, 1967 by Transit Workers Union of America, Local 225, AFL-CIO, (hereafter TWU). The caption in the proceedings did not include the designation "AFL-CIO" in the reference to TWU. The parties have since indicated that the caption can be deemed corrected to include the designation.

[2] The correspondence between the Office of the Chief Trial Examiner and the parties from the time of the notification of the death of Trial Examiner Christopher to the designation of the instant Trial Examiner has been included in the official record, as follows: (a) Letter of December 27, 1967, by the Chief Trial Examiner to all parties; (b) Letter of January 3, 1968, by James E. Fagan, counsel for Respondent, to the Chief Trial

(Footnote continued on following page)

Appendix C

On the entire record and on consideration of the briefs, I hereby make the following:

Findings of Fact

I. The Business of the Employer

Respondent is a Delaware corporation, with its principal office and place of business in Mahway, New Jersey. It is engaged there and in other terminals in the States of New York and Pennsylvania in the transportation of passengers and the performance of related services. Its gross annual revenue exceed $50,000. The parties agree and it is hereby found that Respondent is engaged in commerce within the meaning of the Act.

II. The Labor Organizations Involved

TWU and IBTU (*supra* n. 1 and *infra*, n. 4) are labor organizations within the meaning of the Act.

III. The Alleged Unfair Labor Practices

A. *Issue*

The issue in essence is the significance of Respondent's announcement and then instituting economic reductions

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(*Footnote continued from preceding page*)

Examiner, with copies to counsel for all parties; (c) Letter of February 12, 1968, by the Regional Attorney for Region 22 of the NLRB to counsel for Respondent, with a copy to Associate Chief Trial Examiner Lindner; (d) Letter of February 15, 1968, by the Chief Trial Examiner to counsel for Respondent, with copies to counsel for all the other parties; (e) Letter of February 28, 1968, by counsel for Respondent to the Chief Trial Examiner, with copies to all parties; (f) Letter of February 29, 1968, by the Chief Trial Examiner to counsel for Respondent, with copies to all parties.

Appendix C

(a cut in pay rate and elimination of various fringe benefits) at a time when a representation proceeding under Section 9 was still undetermined.

B. *The Facts*

1. Background

The rivals were TWU, the incumbent, and IBTU, which filed the election petition. Respondent has had contractual relations with TWU for many years. The series of contracts between Respondent and TWU, including the one that was current when IBTU filed the representation proceeding here involved, were all for terms whose starting and expiration dates were in mid-January.

Accounting for the importance Respondent attaches to the January date is the seasonal character of its operations. Its passengers, in the main, are summer vacations. Accordingly, Respondent operates at a profit only during June, July and August, and at a loss the remaining months of the year. Under its certificate of convenience from the Interstate Commerce Commission, Respondent must furnish reasonable adequate service to the public throughout the year, and also keep itself in sound economic condition to be sure it can render that service. The advantage served by a contract ending in January is the leverage afforded by the fact that negotiations begin well before the summer season. Negotiations in the winter assure Respondent against the likelihood of a strike in the crucial summer season. Also, negotiations during the winter strengthen Respondent's power to resist the employees' demands and by the same token, weaken the effectiveness of the bargaining power in making these demands. The employees would have a corre-

sponding negotiating leverage under a contract that started (and ended) nearer to the summer. But though the employees sought such a date in the past, the contracts up to the time here involved had a starting date beginning and ending in mid-January.

Respondent's and TWU's bargaining relations over the years have been relatively stable. Before each contract expired, they came to terms on a new one. In only two instances had there been a "hiatus," and in each instance for no more than a week or less.[3] During both of them, Respondent continued the old terms in effect until the new terms were mutually agreed upon and signed.

2. The election proceeding

(a) *Respondent's expressed anxiety about an early completion of the election proceeding in order that negotiations for a succeeding contract begin early*

In the last week of October 1966, Respondent and TWU had exchanged letters looking toward negotiation of a new contract to succeed the present one expiring January 15, 1967. On October 27, IBTU (an independent organization comprised of Respondent's employees (*infra*, n. 4)), wrote Respondent claiming it represented a majority of the employees, and on October 28, it filed the Section 9 election proceeding.

From the outset of that proceeding Respondent urged expedition so as to obviate the "serious economic prob-

[3] The first was a work stoppage, and the parties came to terms on a new contract in less than a week. In the other instance, the parties, toward expiration of the contract, agreed to an extension, which had been specifically requested by the mediation authorities. The parties came to terms in just a few days.

lems" that would otherwise confront it. Thus, at the "informal conference" in the Board's Regional Office on November 10, John F. X. O'Brien, attorney for Respondent, offered to consent to an election, saying that unless the election issue was speedily resolved, "the Company has serious economic problems," for it "counted on the summer revenues to offset these losses [of the remainder of the year]." The two rival organizations failed to agree, and the matter was set for formal hearing on November 15. At that hearing during off-the-record discussions, Attorney O'Brien repeated that the Company was anxious that the representation issue be brought to a head as soon as possible, because the labor contract with TWU was expiring January 15, and the Company needed assurance for its summer operations.

The Regional Director issued his Decision and Direction of Election on December 5.[4] On December 9, there

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[4] Official notice is taken of the formal proceedings in Case No. 22-RC-3486. The Decision and Direction of Election indicates that the parties turned out to be in basic agreement, on the bargaining unit, as follows:

> All full-time and regular part-time motor coach operators and maintenance employees of the Employer, including supplementary or seasonal operators and the stock room clerks, but excluding all office clerical employees, professional employees, managerial employees, dispatchers, all other employees, guards and supervisors as defined in the Act.

That Decision also indicates that TWU had challenged IBTU's status as a labor organization, because there was no evidence that IBTU had officers or had dealt with employers. IBTU's status as a labor organization was upheld, because it satisfied the requirements of Section 2(5) of the Act. (It exists "for the purpose, in whole or in part," of dealing with employers concerning working terms, and employees participate in it, whether or not it has officers.)

was another "informal conference," this time to discuss the election date and whether the ballots were to be by mail. As had O'Brien at the previous meetings, Irwin Flateman, president of Respondent, urged at this meeting that there be a speedy resolution of the election issue, since time was running out and the Company had its "economic problems."

(b) *Respondent's announcement, at the end of the initial (but as yet inconclusive) tally of the ballots, that it would institute "economies"*

On January 9, all parties were at the Regional Office to learn the result of the count on the ballots. The tally showed TWU, the incumbent, to be in the lead but not by enough to dispense with the need for passing on the challenged ballots.[5] Also, IBTU, the petitioner, was contemplating filing objections to the conduct of the election (which it did shortly afterwards). When informed that it would take at least a month before the post-election steps would be concluded, President Flateman, as he testified, "was just besides [himself] frankly." He added:

> I told them that unless somethings (sic) were done, unless the company had the assurance that we were going to be operating in the summer that we would have to make certain economic adjustments. I don't know exactly what words I used, but certainly indicating that we would have to start to curtail some of our operations over the winter months when we constantly lose money.

[5] The tally was as follows: 104 for TWU, 99 for IBTU, 2 for neither, and 9 undetermined challenged ballots.

Appendix C

On January 13, the Company, because of rumors that employees thought "Adjustments" were going into effect the day after the contract would expire, issued the following:

NOTICE TO ALL EMPLOYEES

In view of the uncertainties of the present situation the Company has been placed in a position making economies necessary.

However, to avoid, if possible, any hardships on our employees, the Company will postpone such economies until Sunday, February 5, 1967.

It is our hope that by that time the present uncertainty will be resolved and a new contract mutually agreed upon.

On February 2, Respondent issued a letter to all officers and employees. The letter specified the "economies" the Company was putting into effect February 5 for all members of the personnel, whether management personnel or employees in or outside the bargaining unit. The "economies" as specified in the letter was as follows:

1. Elimination of Company contributions to Blue Cross, Blue Shield, Major Medical and Life Insurance Programs. Those interested in continuing such coverage must authorize the company on the enclosed form to deduct from wages the amount of such premiums.

2. A reduction of 10% of gross wages to all employees whose gross weekly wages exceed $100.00. This reduction will not reduce such gross wages to an amount less than $100.00, for a full week's work.

Appendix C

3. Elimination of all accruals for vacations and paid holidays.

The letter included a recital of the reasons for the reductions. It stated that the Company had "economic problems" that required solution. It pointed to the fact, earlier mentioned, that the Company derives the bulk of its revenues in the summer months and if deprived of them, it could not meet expenses over a 12-month period. It indicated that the Company had assumed the present pay scale on the basis of the assurance of its summer operations, and that under the current situation it had no such assurance. It stated:

> Present uncertain conditions relating to certification by the National Labor Relations Board of the Company's union employees and the question of who will be certified and with what union the Company can negotiate, have left the Company in a position where it has no assurance that it will be in operation during those critical summer months and able to obtain those needed revenues. Therefore the Company must cut the suit to the cloth it has and reduce its operating expenses to the point where they can be met by current revenues.

The letter advised that the Company had asked its auditor to make a study of all items in which expenses could be reduced, and that "pending such report and the action that will necessarily follow the Company is required in the interest of self preservation to make the following economies dealing with salaries and wages of officers and employees in all categories." The letter then specified the reductions (which have been quoted at the outset

of the treatment of this letter), and added that as soon as the Company received and analyzed the auditor's study, it "will further advise you all." It concluded with the exhortation that all of us "would like to see an end to uncertainty in order to get on with the vital business of planning sound continued operation."[6]

3. Negotiations (after conclusion of certification proceeding) culminating in new contract and less than total restoration of the "economies"

On February 5, Respondent put into effect the reductions described in its letter of February 2. The election proceeding was concluded on March 30, when TWU, the incumbent, having been declared the winner, it was for-

[6] In his testimony, President Flateman acknowledged that neither of the labor organizations had indicated that it would strike, nor had he asked either or both whether they would do so. He further acknowledged that he did not fear a strike, but explained that "without knowledge that we would have a bona fide contract with one of the unions, that there was a possibility that the Company would not be operating in the summer months when they made the profits to offset the severe winter losses." He acknowledged that a delay in the representation proceeding was a factor contributing to its action. (It should be added that the expired contract had included a no-strike clause.)

mally certified.[7] Negotiations between TWU and Respondent began April 7. The negotiators for TWU stated "they would not bargain with this cloud over their head," and demanded that Respondent restore all of the reductions from the date they were instituted. The Company said it "still did not know whether we were going to operate during the summer months." However, it offered to restore all the reductions from the date they were made, provided the effective date of the new contract was retroactive to January, as in the past.[8] TWU refused, saying

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[7] Of the challenges, 3 were overruled and counted. The final tally showed TWU to be the winner by the vote of 106, against 100 for IBTU.

All of IBTU's objections to the conduct of the election were overruled. See Supplemental Decision and Order in Case No. 22-RC-3486 (*supra* n. 4). This included an objection that Respondent had stated it would reduce wages (referring to then existing announcement that "economies" would be made). The Supplemental Decision notes that since this statement was made "after the Tally of Ballots issued, [it] could not raise substantial and material issues with respect to conduct affecting the results of the election." IBTU filed a request for review, which the Board denied as not raising substantial issues. The Supplemental Decision noted, however, that IBTU had interveningly, filed a charge of unfair labor practices on February 6 (*supra*, n. 1). (That was the day after Respondent made the wage and fringe reductions described in its February 2 letter.) The Supplemental Decision (at its footnote 21) noted that the unfair labor practice charge was under investigation, with the implication that this was a separate issue from the objection concerning the results affecting the election.

[8] The retroactivity was to be comprehensive. All terms, when agreed upon, were to be retroactive to the effective starting date of the new contract, i.e. the increases in hourly rates would be retroactive to the effective starting date, and so would the fringe benefits.

that the men had waited "too long" for a starting date corresponding to the present, and that they would even like to make it effective as of the date negotiations would be completed. The effective starting date as finally agreed on was March 31, the date of the certification, and this was embodied in the memorandum of agreement executed by both parties on April 22, and in the formal contract executed May 2.

The negotiations regarding the reductions were completed on the following basis: Respondent restored the vacations and paid holidays in full from February 5, the date they had been eliminated. However, the other reductions (ie. the 10 per cent cut in pay and the elimination of the contribution for health and life insurance) were restored only for the period beginning March 31, but not restored for the period between February 5, when it was put into effect, to March 31, the effective starting date of the new contract. TWU indicated, however, that it was not waiving its position that the reductions were illegal from their inception.[9]

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[9] As appears (*supra*, n. 1), IBTU filed its charges of unfair labor practices on February 6, which is the day after Respondent made the reductions (*supra*, n. 7).

TWU filed its charges on April 11. This was after it was certified in the representation proceeding and shortly after the negotiations with Respondent for a new contract began.

The charges of IBTU claimed violations of 8(a)(1) and (3). TWU, in its charges, claimed that Respondent violated Section 8(a)(1), (3) and (5) of the Act. The claim of an 8(a)(5) violation was disallowed by the General Counsel. (See the Regional Director's letter to the TWU, dated July 11, 1967: General Counsel Exh. 2.) The General Counsel's complaint alleged violations only of Section 8(a)(1) and (3).

Appendix C

C. *Conclusionary Discussion*

(1)

Paradoxically, the basis on which the General Counsel condemns the conduct is relied on by Respondent as providing its exoneration. The General Counsel's position is that by announcing and then instituting the reductions while the representation proceeding was not yet concluded, Respondent interfered with the rights of the employee to determine their own bargaining representative in violation of Section 8(a)(1). The General Counsel further their views the reductions as discriminatory and as having the intent or necessary effect of discouraging membership in either or both labor organizations in violation of Section 8(a)(3). Respondent on the other hand, avows it did not act with an anti-union motive, and if its conduct could nevertheless be deemed to have in some way interfered with the employees' rights—which it disputes in any events—this is overbalanced by justifiable action in protection of its legitimate economic interests.[10]

(2)

As I read General Counsel's position, it is that Respondent's drastic reduction in the employees' earnings stemmed from the fact that the representation case was still pending, and that this, whether Respondent intended it or as the employees would naturally view it, was a reprisal for employees engaging in protected activity. Respondent, to be sure, imposed these reductions upon all the personnel, but it was in response to the protected activity of the

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[10] Respondent further avers that its contract negotiations with TWU after conclusion of the representation proceeding constituted an accord which wiped out such offense as might otherwise be imputable to Respondent.

employees in the bargaining unit (*supra*, n. 4) that Respondent made these reductions. It was discriminatory, since the representation proceedings and the consequent suspension of negotiations pending its completion accounted for the wage reductions that would otherwise not have been made. Visiting the loss on those outside the bargaining unit as well did not make it nondiscriminatory toward those within the bargaining unit. It simply extended the discriminatory conduct to those outside as well as those in the unit.

The General Counsel invokes to employees engaged in a representation proceeding, principles comparable to those applied where employees have engaged in lawful activity.[11] In substance, under the rational articulated in *Great Dane* (*supra*, n. 11, at 34), which the General Counsel quotes, there are two principles which the General Counsel deems applicable here. The first is that the Respondent's conduct in imposing the reductions was "inherently destructive of important rights," from which an anti-union motive may be inferred without need for the General Counsel to prove it. The second is that even if the "adverse effects" on the employees' rights were "comparatively slight," there was nevertheless a violation, unless Respondent has come forward with "legitimate substantial business justifications" for its conduct, in which event, the General Counsel would have had to establish that Respondent was wrongfully motivated. The General Counsel asserts that Respondent has not meet the "substantial business justification" requirements, because Respondent was not war-

[11] *N.L.R.B.* v. *Erie Resistor Corp.*, 373 U.S. 221; *N.L.R.B.* v. *Great Dane Trailers*, 388 U.S. 26.

ranted in reducing the employees' earnings beginning in the winter as an offset against a strike in the summer, which was neither imminent, nor threatened, nor portended. The General Counsel further asserts that Respondent, in making these reductions, was not truly motivated by a concern about a summer strike, so much as by a desire to have negotiations start in the winter as before, or that failing, to reacquire in the new contract a winter starting date, as in the past. The result, as the General Counsel contends, is that there was a violation of the Act, whether its "adverse effects" were "destructive" or "comparatively slight."

(3)

If we telescope events to the ultimate—i.e., the stage when the representation proceeding was concluded and the new contract negotiated, it can be said to have hardly had a tearful ending. As a consequence of the representation proceeding, the negotiations which used to begin in the late fall or early winter, now began in the spring. As stated before, the employees had sought to accomplish this in the past by a contract which would expire in the spring instead of the winter, but until then to no avail. Now they achieved it as a result of the suspension of the negotiations which had been brought about by the representation proceeding. To be sure, the employees did not plan it that way, but the result favored them nevertheless. President Flateman testified that the increases the employees received under the new contract exceed those of prior contracts. This is not denied. He also testified that the higher increases they received this time were the result of the fact that negotiations began so much nearer to the summer than in the past. The Trial Examiner excluded this

last, but Respondent in its brief urges this as a rational inference. Since, as is not disputed, each side (Respondent, on the one hand, the employees on the other) has the advantage in the negotiations, depending on the remoteness or proximity of the negotiations to the summer months, Respondent's inference is hardly implausible. That is to say, we may assume that the greater increases the employees obtained under the new contract over those in prior contracts reflected the increased bargaining power of the employees because negotiations in this instance began nearer to the summer than negotiations of prior contracts. Whether that was the whole reason for the increase or had still other reasons (such as the not altogether inconceivable one that the prospects of the vacation trade the forthcoming summer were thought to be greater than in past summers) one does not know. But whatever the increase and its reason, Respondent's additional contention that because of this increase, the employees really had received restitution for the portion of the reductions made in February that Respondent refused specifically to restore to the employees (unless they agreed to an effective January date for the new contract) strikes one as a non-sequitur. As indicated (*supra*, n. 8), each was a separate item of negotiations. The rates under the new contract were one item. The restoration of the reductions made in February and the condition imposed upon full restoration (that the contract be made retroactive to a winter date as before) was another item. This in any event, is a matter to be deferred pending discussion of whether Respondent's conduct in January and February constituted violations as of the time they occurred.

(4)

As matters stood when Respondent, in January and February, respectively announced and then put these "economies" into effect, the employees found their earnings drastically curtailed and their fringe benefits of highest importance taken from them in consequence of a proceeding in which the drivers and maintenance men (*supra*, n. 4) were engaged, and which the Act protects. The fact that these reductions were visted upon all the employees hardly lightened the impact upon the employees who were engaged in the representation proceeding. Since it was out of this proceeding that Respondent's conduct flowed, the employees would tend to think twice before again engaging in a representation proceeding. In any event, as the General Counsel puts it, that kind of a loss in earnings and benefits because of a representation proceeding that was still pending "could effectively inhibit any change by employees of their bargaining representative."[12]

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[12] The Board has held that where an employer changes working conditions even after an election and during the post-election stage of a representation proceeding, it could still be a violation depending on the circumstances. The basic test, as stated, is whether the change was "because of economic circumstances unrelated to union organization," in which case the employer is exonerated, or because "of the union's presence," in which case there is a violation. See *McCormick Longmeadow Stone Co.*, 158 NLRB 1237, 1242. Compare *Champion Pneumatic Machinery*, 152 NLRB 300. See also *Ambox, Inc.*, 146 NLRB 1520, enfd, as mod. 357 F. 2d 138 (C.A. 5). These cases involved the validity of the employer's grant or promise of benefits during the post-election stage, based on whether the purpose or necessary effect of the employer's conduct was to alienate employees from the Union. This is not the precise kind of situation before us. The

(*Footnote continued on following page*)

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Unexplained, the conduct as of the time it occurred offended the employees' rights, protected by the Act, to engage in a representation proceeding, thereby violating Section 8(a)(1) and to the extent that this meant losses in their earnings which otherwise would not have happened, it would tend, as stated (*supra*, n. 12), to alienate the employees from the labor organization that accounted for the proceeding that brought on the travail,—the petitioning IBTU. Also, insofar as such action would tend to hinder the bargaining process that was then reasonably in prospect, it would discourage membership in the exclusive bargaining representation, as ultimately determined, in violation of Section 8(a)(3). All of this last, however, would be derivative of the underlying offense, —the toll Respondent levied in the employees for engaging in a representation proceeding. We come to Respondent's justification for making the levy.

(footnote continued from preceding page)

relevance in the cited cases is not in their precise content but in their implications. The case before us is one concerned not with Respondent's acting to help or harm either of the rivals or the two in combination, so much as to infringe, whether in intent or as a necessary consequence, on the protected right of the employees to engage in a concerted activity (a representation proceeding) which is concerned with the employees' freedom of choice in the selection of their bargaining representative. Insofar as the deprivations visited on the employees in that situation could be said to discourage membership, it would naturally be the organization which brought the proceeding and continued it by its post-election challenges and objections,—the petitioning IBTU. Also, as later appears, the conduct insofar as it was naturally calculated to obstruct the bargaining process would discourage membership in the exclusive bargaining representative whoever the ultimate winner.

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(5)

Respondent's justification has the anomolous aspect as earlier stated, of being based on the very representation proceeding itself. The proceeding had reached the stage where the contract had now expired, and there was still no bargaining representative selected with which to conduct negotiations, and so as Respondent put it in its letter of February 2, Respondent "has no assurance that it will be in operation during these critical summer months," with the result that "it must cut the suit to the cloth it has and reduce its operating expenses to the point they can be met by current revenues."

However, the very nature of Respondent's operations is such that until June, the revenues are less than the expenses. Yet not until the events here involved had Respondent ever before curtailed employees' earnings to overcome the customary and traditional operating losses that precede the summer months. Further, the expression Respondent employed to describe the current situation, that "it must cut the suit to the cloth it has" is hardly accurate. Respondent's own records show a consistent net operating profit at the end of each calendar year, including 1966. And Respondent's auditor, who according to the letter of February 2, was asked "to make a study" which Respondent was then awaiting, testified that Respondent as of February 1967 "definitely" had a surplus, though he could not yet state how much. So the "cloth it ha[d]" in early 1967 amply met the "suit."[18] And in cutting these

[18] This is quite unlike *Jordan Bus Co.*, 107 NLRB 717, on which Respondent relies, where the employers "found themselves in a hazardous financial situation *at the time the reduction was announced and effectuated.*" (Emphasis added.)

employees earnings nevertheless, Respondent was projecting itself into a situation envisaged for nearly a half year later. And it projected on the basis of nothing that was either imminent or impending or even probable. President Flateman in his testimony (*supra*, n. 6), based the reductions that Respondent made at the beginning of the year solely on the mere "possibility" that Respondent would not be operating in the middle of the year. Indeed, its letter of February 2 states that it was now reducing the employees' pay to correspond to the current revenues solely because it "has no assurance" that it will operate in the summer, which is, in effect, to say that it was not certain in January or February that there would *not* be a strike in June or July.

But a strike presupposes negotiations in which the parties have fallen apart. It is not an event which is self-creating because summer is coming or has arrived. There was every reason to expect in view of the nature of initial tally on January 9 (*supra* n. 5), that there would be a collective-bargaining representative determined and that negotiations would begin reasonably before the summer—as indeed happened. Respondent, in making the reductions on the basis of the "possibility" of a strike in the summer, was thus projecting itself into the following sequence: (a) the bargaining representative would present its demands, (b) Respondent would deem them unacceptable, (c) the bargaining representative instead of yielding and trying to reach an accommodation will strike,—and there would go our summer revenues on which we depend for making out during the calendar year.

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(6)

Assuming that Respondent genuinely intended these wage reductions it made in February as an economic hedge against a possible strike in June or July, the tenuous nature of that possibility is not commensurate with the drastic character of the action and the overwhelming probability of its effects on employees' protected rights when the action was taken. Even if the disproportion between the action taken and the apprehensions claimed had a more rational basis, Respondent would not now have been justified in exerting that kind of economic pressure to meet the ultimate in a negotiating sequence,—to wit a strike, before even the first step in that sequence had started. Respondent relies heavily on the doctrine in *American Ship Building.*[14] The employer there, after an impasse in negotiations with the bargaining representative, engaged in a lockout for the sole purpose of achieving the economic objective which the Union resisted during the negotiations. However, these steps had already taken place: there had ben negotiations between the employer and the bargaining representative; the bargainers were hopelessly apart; and the employer locked out the employees with the conveyed understanding that they would all go back with full seniority once that economic issue was resolved in the employer's favor. The inference Respondent seeks to draw from *American Ship* is that the employer may validly exert economic pressure to realize any bargaining advantage so long as it is not motivated by an antiunion purpose and the employer has not otherwise violated a protected right. The parallel at once falls because the deprivations visited upon the employees here

[14] *American Ship Building Co.* v. *N.L.R.B.*, 380 U.S. 300.

stemmed from the protected activity in which they were engaged,—the choice of a bargaining representative. The subject on which the parties in *American Ship* fell apart (and on which Respondent relies heavily as an analogy here) is that the dispute in *American Ship*, which the employer sought to resolve by the lockout, was over the date to which an expired contract was to be extended. The Union there insisted on 6 months, which would have meant that negotiations would begin at the peak of the employer's business season (likewise seasonal as here). The employer insisted that the extension be for a longer period, so as to avoid being confronted with negotiations that began at the peak of the employer's business. The differences there are at least twofold: the expiration date of the extension of the contract had been fully negotiated and reached a point of impasse; secondly, the negotiations throughout the years of the bargaining relationship had consistently culminated in a strike. Here they had (with a very brief exception, *supra* n. 3), invariably ended in agreement.

Respondent finally falls back on the fact that when it made the reductions here, the bargaining representative had not yet been determined so that there was no one to negotiate with. This, however, does not do away with the fact that Respondent was not here acting to meet a present economic exigency but one predicated, as stated, upon the outcome of negotiating that would take place. Respondent was assuming the culmination of a sequence that had not even had a beginning, and on no other basis than that it had no "assurance" that there would be not such a culmination,—a summer strike.

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(7)

The discussion until now has assumed that the reductions Respondent made were in fact intended by it as an offset against a summer strike. And, as stated, that furnished no justification for its actions even if that had been the true reason for its action. The record rather seems to militate against that as Respondent's actual reason. When Respondent, as far back as the start of the representation case in early November, urged an early end of the representation proceeding because of "serious economic problems" otherwise encountered, it could hardly have meant problems encountered by an actual strike so much as problems encountered by a more effective bargaining power by employees nearer the summer than that in the winter. That explains why Respondent was anxious to have the representation proceeding (which by its very filing held up negotiations that had just gotten under way with the incumbent TWU) end quickly so as to reduce to a minimum the customary start of negotiations in relation to the summer. Consistent with it was the very use that Respondent made of the earnings' reductions in the ensuing contract negotiations after the representation proceeding ended. Respondent was now again dealing with the incumbent TWU with which it had enjoyed stable relations over nearly a score of years. So Respondent now had every reasonable assurance that its operations would continue this summer as in the past. Yet though Respondent has professed that these reductions were made as an offset to a putative summer strike, Respondent did not restore these reductions as TWU requested at the outset, but used these reductions to trade for a contract with a January starting date as before. And, as appears, though it restored the vacations and paid holiday accruals

from their inception, and restored the other reductions retroactively only from the period of the effective date of the new contract, it did not restore them for the intervening period from February 5, when they were put into effect, to the date of the new contract.

Respondent estimated the amount of the unrestored sum (presumably of the employees involved in the bargaining unit) at about $15,000, and indicated that that too was good money. But it was money that Respondent nevertheless offered to restore to the employees if they would but agree to make the contract retroactive to the winter as before. And it offered the employees even more money in the form of having all the new terms including the increase in hourly rates, retroactive to January if they would agree to make that the beginning date of the new contract.

This brings us to the view expressed by President Flateman at the hearing and by Respondent in the brief, (described earlier in our conclusionary discussion—item (3)) that the increases the employees obtained under the new contract exceeded those obtained under all the prior contracts, and that that overcame and thereby restored in all but the legal or technical sense, the totality of the reductions from their inception, including those for the period from February 5 to March 31 that Respondent refused specifically to restore. In essence, Respondent views the employees' increases in 1967 under the leverage of negotiations that began in the spring, as losses that Respondent incurred because this time it had not been able to bargain through strength as before, when negotiations had begun at a period far remote from the summer. It was the "economic problems" arising from

the loss of its prior bargaining leverage that the fair sense of the record shows Respondent sought to overcome by the reduction it instituted in February, and it was the reacquisition of that advantage for the future that Respondent sought to achieve by the reductions made."[11]

So the sense of the record indicates that what Respondent was seeking to achieve by these reductions was its use in later negotiations to induce the employees to agree to a January starting date for the new contract. Had Respondent made these reductions when the bargaining representative had already been selected but before any negotiations had yet taken place, it would have been a violation of Section 8(a)(5),—the reason for its not being alleged as 8(a)(5) was (*supra*, n. 9) that the rep-

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[11] Further tending to support the inference that the reductions were aimed at an effort to reacquire the January starting date for its contract rather than to provide an economic hedge against the possibility of a summer strike is, first, that Respondent made no "economies" other than wages taken from the employees. Secondly, though Respondent, in its letter of February 2, claimed no other "economies" were feasible except through reduction of its labor costs, the record shows that it increased labor costs by taking on 16 new employees in the bargaining unit for the period from February 5 to May 1. The figure was based on TWU's own seniority roster of employees in the bargaining unit, and though Respondent sought to undermine that figure by indicating that TWU had no evidence concerning how many replacements they represented, Respondent did not itself supply any figures of its own, though it was itself in a peculiar position to do so. Additionally, Respondent attributes the new hirings to its continuous passenger service requirement under the certificate of convenience. Nothing apparently reflects the pessimism toward summer operations except the premise asserted for the drastic wage reductions.

resentation case had not yet been concluded when Respondent made these cuts. But the selection of the representative was in the offing and the reductions contemplated the use of that money to affect the subject matter of future negotiations,—whether it be the summer strike of whose avoidance Respondent said it had "no assurance," or the reacquisition in the new contract of a winter starting date as in the past. In either instance it provided no valid justification for the invasion of the employees' protected right to engage in a representation proceeding without reprisal or threat for engaging in it.

(8)

The basic violation here as stated was an interference with the employees' protected right to determine and freely choose their bargaining representative. Calculated as it was to obstruct the bargaining process, it was an act of discrimination which inherently discouraged membership in the exclusive bargaining representative, whichever of the rivals it might turn out to be. This is so whether the reductions were made as an economic nest egg to meet a possible strike in the summer, as Respondent claims, or as the facts would seem more preponderantly to indicate, to use these moneys as inducements to the employees to return to the January starting date as before. In either instance, there was no "substantial business justification" for the action taken, with the result that Respondent's actions offended Section 8(a)(1) and (3) without regard to whether Respondent was subjectively motivated to bring about the interference and discouragements that flowed from its actions. On the issue of actual motivation, Respondent's

attributing the reductions to an intended offset to a possible strike—even if not providing a valid justification if genuinely entertained—turns out on the facts to have been a cloak for its actual objective, which was to use the moneys taken from the employees to buy back a January starting date as before. This bears on the genuineness of its motivation, for Respondent must have known and actually intended the normal consequences of its actions and thereby have acted with an antiunion motive. These involved inroads on the employees' right under the Act in a representation proceeding to determine their choice of representative without being threatened or penalized for doing so. I accordingly find and conclude that Respondent in making these reductions interfered with, restrained and coerced its employees in the exercise of their rights under Section 8(a)(1) and discouraged membership in a labor organization in violation of Section 8 (a)(3).[18]

IV. The Remedy

The cease and desist requirement should be confined to the specific violation found. In essence, it will be a recommendation that Respondent refrain from interfering with the rights of employees to engage in a representation proceeding by threatening to and changing their

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[18] During the hearing, the Trial Examiner struck certain additional testimony of Company President Flateman and Attorney O'Brien to the effect that with the expiration of the contract expiring on January 15, 1967, Respondent faced a genuine economic problem. This was basically repetitive of what had been fully testified to and does not add to what is already in the record. The answers as proposed would not have changed the results and Respondent was not prejudiced by the ruling.

working terms in order to discourage them from engaging in such a proceeding.

As to the affirmative remedy, there is the matter of whether the employees should be made whole for the reductions of their earnings to the extent that they were not fully restored. As stated, Respondent thinks the employees really got all that money back because of the wage increase they received in comparison with the less generous ones of the previous years. Respondent can hardly claim to have made these wage increases in order to achieve a restoration of the earnings' reductions. The wage reductions, as President Flateman claimed at the hearing and Respondent urges in the brief, reflected the bargaining effectiveness of the employees. There is no specific evidence as to what altogether accounted for them. Whether it was due to Respondent's anticipating an increase in the size of forthcoming vacation trade over prior summers, or to the fact that the employees had greater bargaining effectiveness in the spring than they would have had in the winter, or a combination of the two, the increases were one thing, and the reductions visited on them on February 5, were something else again. When Respondent proposed that the new contract be retroactive to January the retroactivity as stated (*supra*, n. 8), was comprehensive. It included two things, (a) the newly agreed upon working terms whatever the increases, and (b) separately, the restoration of the reductions made on February 5. Since, as has been found, these cuts had been illegally imposed from their inception, there would seem to be no valid basis for withhold-

ing full restoration of the reductions to the extent that they have not been restored."

Upon the foregoing facts and on the entire record, I hereby make the following:

Conclusions of Law

1. By threatening to reduce the wages and eliminate the fringe benefits of its employees because the representation proceeding in which these employees had engaged had not yet been completed, and by so doing, Respondent interfered with, restrained and coerced em-

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" There are two additional items to be considered.

(a) Respondent contends (supra, n. 10) that the negotiations concerning the extent of the restoration of the reductions were an accord, which wiped out its liabilities under the Act. This overlooks the public character of the obligation which is not controlled by settlements of the private parties. *See Local Union No. 2, Plumbers (Ambrose)*, 152 NLRB 1093, 1112, and cases cited, enfd, as mod. 389 F. 2d 429, 435 (C.A. 2).

(b) Though the reductions flowed from and were the result of the representation proceeding in which the drivers and maintenance employees were involved (supra, n. 4), Respondent imposed these reductions on all employees. The result, as stated, was not that this thereby removed the impact upon those in the bargaining unit, but that it extended its impact to all employees for what it specifically sought to achieve in respect to the employees involved in the bargaining unit. The record does not inform us concerning whether and to what extent Respondent restored the reductions made on February 5 to employees outside the unit. However, the policies of the Act call for restoring the reductions made upon all the employees to the extent that Respondent has failed to do so.

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ployees in the exercise of their rights under Section 7 of the Act thereby engaging in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

2. By discriminating in respect to terms and conditions of employment to discourage membership in a labor organization, Respondent engaged in unfair labor practices within the meaning of Section 8(a)(3) of the Act.

3. Said unfair labor practices affect commerce within the meaning of Section 2(6) and 2(7) of the Act.

Upon the foregoing findings and conclusions and on the whole record and pursuant to Section 10(c) of the Act, the undersigned Trial Examiner hereby issues the following:

Recommended Order

Hudson Transit Lines, Inc., its officers, agents, successors and assigns, shall:

1. Cease and desist from:

(a) Threatening to reduce or reducing employees' wages or to eliminate or eliminating fringe benefits for engaging in a representation proceeding relating to the selection of the employees' collective-bargaining representative.

(b) Otherwise discriminating or threatening to discriminate in respect to the terms and conditions of employment to discourage membership in either or both labor organizations that are involved in a representation proceeding.

(c) In any like or related manner, interfering with, restraining or coercing employees in the exercise of their rights protected under Section 7 of the Act.

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2. Take the following affirmative action to effectuate the policies of the Act:

(a) Make whole the losses sustained by all employees for the cut in wage and elimination of fringe benefits made on February 5, 1967, by restoring these to the extent that Respondent has not done so.

(b) Post at its place of business in Mahwah, New Jersey, copies of the attached notice marked "Appendix."* Copies of said notice, on forms provided by the Regional Director for Region 22, after being duly signed by the Respondent's representative, shall be posted by it immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(c) Notify said Regional Director, in writing, within 20 days from the receipt of this Decision,

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* In the event that this Recommended Order is adopted by the Board, the words "A DECISION AND ORDER" shall be substituted for the words "THE RECOMMENDED ORDER OF A TRIAL EXAMINER" in the notice. In the further event that the Board's Order is enforced by a decree of a United States Court of Appeals, the words "A DECREE OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER" shall be substituted for the words "A DECISION AND ORDER."

what steps Respondent has taken to comply herewith.[19]

Dated at Washington, D. C. May 10, 1968.

Original signed by:
A. NORMAN SOMERS
Trial Examiner

APPENDIX

NOTICE TO ALL EMPLOYEES
PURSUANT TO
THE RECOMMENDED ORDER OF A TRIAL EXAMINER OF THE
NATIONAL LABOR RELATIONS BOARD
and in order to effectuate the policies of the
NATIONAL LABOR RELATIONS ACT

we hereby notify our employees that:

WE WILL NOT reduce or threaten to reduce wages or eliminate or threaten to eliminate fringe benefits of our employees for engaging in representation proceedings to determine their free choice of labor organizations to represent them as their collective-bargaining agent. NOR WILL WE otherwise discriminate in respect to the terms or conditions of employment of employees to discourage membership in any labor organization involved in such representation proceeding.

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[19] In the event that this Recommended Order be adopted by the Board, this provision shall be modified to read: "Notify said Regional Director, in writing, within 10 days from the date of this Order, what steps the Respondent has taken to comply herewith."

Appendix C

WE WILL NOT in any like or related manner interfere with, restrain or coerce employes in the exercise of their rights guaranteed them under the Act.

WE WILL make whole the losses sustained by all employees for the cut in wage and eliminations of fringe benefits made on February 5, 1967 by restoring them to all of our employees to the extent that we have not already done so.

HUDSON TRANSIT LINES, INC.
(Employer)

Dated———————

By———————————————
(Representative (Title)

———————

This Notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material.

If employees have any questions concerning this Notice or compliance with its provisions, they may comunicate directly with the Board's Regional Office, 614 National Newark Building, 744 Broad Street, Newark, New Jersey 07102 (Tel. No. 645-3088).

APPENDIX D

Decision and Order of National Labor Relations Board

On May 10, 1968, Trial Examiner A. Norman Somers issued his Decision in the above-entitled proceeding, finding that the Respondent had engaged in and was engaging in certain unfair labor practices alleged in the complaint and recommending that it cease and desist therefrom and take certain affirmative action, as set forth in the attached Trial Examiner's Decision. Thereafter, the Respondent filed exceptions to the Trial Examiner's Decision and a supporting brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its powers in connection with this case to a three-member panel.

The Board has reviewed the rulings of the Trial Examiner made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. The Board has considered the Trial Examiner's Decision,[1] the exceptions and brief, and the entire record in this case, and hereby adopts the findings, conclusions, and recommendations of the Trial Examiner.[2]

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[1] The Trial Examiner at the hearing was Arthur Christopher, Jr., now deceased. A. Norman Somers was duly designated by the Chief Trial Examiner to prepare the Trial Examiner's Decision in this case. See footnote 2 of the Trial Examiner's Decision.

[2] In adopting the Trial Examiner's conclusion that the Respondent's announcement and institution of reductions in various employee benefits violated the Act, we rely on Section 8(a)(1), and do not deem it necessary to determine whether the conduct in question also violated Section 8(a)(3).

Appendix D

Order

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby adopts as its Order the Recommended Order of the Trial Examiner, as modified herein, and orders that the Respondent, Hudson Transit Lines, Inc., Mahwah, New Jersey, its officers, agents, successors, and assigns, shall take the action set forth in the Trial Examiner's Recommended Order, as so modified:

1. Paragraph 1(b) of the Trial Examiner's Recommended Order is hereby deleted, and paragraph 1(c) is renumbered 1(b).

2. The last sentence in the first paragraph of the Notice, beginning "NOR WILL WE otherwise discriminate . . ." is hereby deleted.

Dated, Washington, D. C. Oct. 9, 1968

Gerald A. Brown, Member
Howard Jenkins, Jr., Member
Sam Zagoria, Member
NATIONAL LABOR RELATIONS BOARD

(SEAL)

APPENDIX E

Relevant Provisions of the National Labor Relations Act

Rights of Employees

Sec. 7. Employees shall have the right to self-organization, to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any and all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in Section 8(a)(3).

Unfair Labor Practices

Sec. 8(a). It shall be an unfair labor practice for an employer—

(1) to enterfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7.

In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 983

HUDSON TRANSIT LINES, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-19a) is reported at 429 F. 2d 1223. The Board's decision and order (Pet. App. 22a-55a) are reported at 173 NLRB No. 13.

JURISDICTION

The judgment of the court of appeals (Pet. App. 20a-21a) was entered on August 21, 1970. The peti-

tion for a writ of certiorari was filed on November 19, 1970. This Court's jurisdiction is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the Board properly concluded that the company had not established a legitimate and substantial business justification for reducing wages and eliminating certain fringe benefits during the pendency of a Board representation proceeding, thereby restraining its employees in the exercise of their right to select a bargaining representative.

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*), are set forth at pp. 2-3 of the petition.

STATEMENT

A. The Board's Findings of Fact

Since 1950, the Company—which operates a public bus service in a resort area and caters primarily to summer vacationers—has had successive bargaining contracts with the Transport Workers Union ("TWU"). These agreements all had beginning and expiration dates in early January. The January date was advantageous to the Company because it assured that negotiations would occur during a time when the Company was operating at a loss, and was therefore

in a better position to withstand a strike. (Pet. App. 24a; R. 34-35, 43.)[1]

In October 1966, the Company and TWU commenced negotiations for a new contract. The negotiations were halted, however, when the Independent Bus Transit Union ("IBTU") filed a petition with the Board, seeking a representation election among the Company's employees. (Pet. App. 25.) On November 10, the Company's attorney offered to consent to an election, stating that, since the Company "counted on the summer revenues to offset" its losses during the balance of the year, it was anxious to have the election as soon as possible (Pet. App. 25a-26a; R. 24-25). Since the two unions could not come to an agreement on the election details, however, it was necessary to hold a formal hearing on November 15. During discussions that day, Company counsel again indicated that the Company desired a quick disposition of the representation issue because its contract with TWU expired on January 15 and it needed to know where it was "going for the summer months." (Pet. App. 26a; R. 25-26.)

In the election held on January 9, 1967, TWU received 104 votes, IBTU received 99, 2 votes were cast for neither, and 9 ballots were challenged. Upon learning that it would take at least a month for the

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[1] Traditionally, the Company's operating expenses exceed income during the first, second, and fourth quarters; during the third quarter, July 1 to September 30, it recoups these losses and makes a profit (R. 35, 48-49, 113-114). ("R." references are to the joint appendix to the briefs filed in the court below.)

Board to resolve the challenges and the objections which IBTU planned to file, Company President Flateman "was just beside [himself]." He informed the unions that "certain economic adjustments" would have to be made. (Pet. App. 27a; R. 29-30.) On January 13, the Company issued the following notice to its employees, who had been hearing rumors that "adjustments" would go into effect on January 16, the day after the current contract expired (Pet. App. 28a; R. 31-32, 106):

NOTICE

TO ALL EMPLOYEES:

In view of the uncertainties of the present situation the Company has been placed in a position making economies necessary.

However, to avoid, if possible, any hardships on our employees, the Company will postpone such economies until Sunday, February 5, 1967.

It is our hope that by that time the present uncertainty will be resolved and a new contract mutually agreed upon.

On February 2, in a letter to all officers and employees, President Flateman stated that, since the question of which union would represent the employees had not yet been resolved and the Company thus had no assurance that it would be in operation during the "critical summer months," it was, as of February 5, effecting the following "operating economies":

1. Elimination of Company contributions to Blue Cross, Blue Shield, Major Medical and Life Insurance Programs. Those interested in con-

tinuing such coverage must authorize the company on the enclosed form to deduct from wages the amount of such premiums.

2. A reduction of 10% of gross wages of all employees whose gross weekly wages exceed $100.00. This reduction will not reduce such gross wages to an amount less than $100.00, for a full week's work.
3. Elimination of all accruals for vacations and paid holidays. [Pet. App. 28a; R. 98-99.]

On February 5, over the protest of TWU, the Company put these changes into effect (Pet. App. 30a; R. 8-9).

On March 31, 1967, the Board, after overruling IBTU's objections to the election and resolving the challenged ballot issues, certified that TWU was still the representative of the Company's employees (Pet. App. 30a-31a, n. 7). The Company and TWU resumed contract negotiations on April 7, and TWU demanded that the Company restore the reductions in wage and other benefits retroactive to the date when they were instituted (Pet. App. 31a; R. 9, 33). The Company offered to do so if TWU would agree to make the effective date of the new contract retroactive to January (Pet. App. 31a; R. 35, 70). TWU refused, proposing, instead, that the contract be effective as of the date negotiations were completed (Pet. App. 32a; R. 34).

On April 22, the parties arrived at a renewal contract which was effective as of March 31, the date of TWU's certification. The new contract restored the vacations and paid holidays as of February 5,

when they were eliminated. However, the other reductions—the 10 percent pay cut and the elimination of the Company's contributions for health and life insurance—were restored only as of March 31, the effective date of the new contract. (Pet. App. 32a; R. 100-105.)

B. The Decisions Below

The Board found that the Company, by threatening to reduce the wages and other benefits of its employees, and by actually so doing, while a representation proceeding was pending, interfered with the employees' right to select a bargaining representative. The Board reasoned that, "[s]ince it was out of this proceeding that [the Company's] conduct flowed, the employees would tend to think twice before again engaging in a representation proceeding" (Pet. App. 37a). Moreover, such action "would tend * * * to alienate the employees from the labor organization that accounted for the proceeding that brought on the travail,—the petitioning IBTU" (Pet. App. 38a). The Board further found that, even accepting the Company's contention that the reductions made in February were an economic hedge against a possible strike in June or July,[2] that possibility was so tenuous and speculative that it did not constitute a legiti-

[2] The Board found that the primary reason for the Company's reduction in benefits was not to provide an economic hedge against a possible summer strike, but rather to give the Company leverage in the impending negotiations for obtaining a January starting and termination date for the contract (Pet. App. 47a).

mate and substantial business justification which justified the Company's impairment of its employees' right freely to select a bargaining representative (Pet. App. 40a-42a, 46a).[3] The Board concluded that the Company's action violated Section 8(a)(1) of the Act (Pet. App. 49a-50a, 54a, n. 2), and ordered it to make whole all employees for the losses sustained, and to post the customary notices (Pet. App. 50a-53a, 55a).

The court of appeals sustained the Board's findings and conclusions, and enforced its order (Pet. App. 1a-19a).

ARGUMENT

In *National Labor Relations Board* v. *Fleetwood Trailer Co.*, 389 U.S. 375, 378, this Court reemphasized the principle that, where an employer engages in conduct which tends to interfere with the exercise of his employees' Section 7 rights, "he is guilty

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[3] As the Board pointed out (Pet. App. 40a):

> * * * a strike presupposes negotiations in which the parties have fallen apart. It is not an event which is self-creating because summer is coming or has arrived. There was every reason to expect in view of the nature of [the] initial tally on January 9 * * * that there would be a collective-bargaining representative determined and that negotiations would begin reasonably before the summer—as indeed happened. Respondent, in making the reductions on the basis of the "possibility" of a strike in the summer was thus projecting itself into the following sequence: (a) the bargaining representative would present its demands, (b) Respondent would deem them unacceptable, (c) the bargaining representative instead of yielding and trying to reach an accommodation will strike, —and there would go our summer revenues * * *.

of an unfair labor practice" unless he "can show that his action was due to 'legitimate and substantial business justifications,'" quoting from *National Labor Relations Board* v. *Great Dane Trailers*, 388 U.S. 26, 34. Petitioner does not appear to contest the Board's finding, approved by the court below, that its action in reducing wages and other employee benefits during the pendency of a representation proceeding tended to restrain the employees in the exercise of their Section 7 right freely to select a bargaining representative. Its basic contention is that the Board erred in concluding that it failed to establish a legitimate and substantial business justification for its action. This issue turns on the facts of the particular case, and does not warrant review by this Court.

Moreover, as the Court added in *Fleetwood*, *supra*, it "is the primary responsibility of the Board and not of the courts 'to strike the proper balance between the asserted business justifications and the invasion of employee rights in light of the Act and its policy.'" Since the possibility of a strike in July or August was remote and speculative in February when the Company reduced employee benefits (see n. 3, *supra*), the Board reasonably concluded that, even if the Company was motivated by a desire to protect itself against economic losses caused by a strike, as it claimed (but see n. 2, *supra*), that was not, in the circumstances here, a business justification sufficient to justify the impairment of employee rights.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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